

HONORABLE J. KELLEY ARNOLD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

ROBERT AINSWORTH

Plaintiff,

vs.

BNSF RAILWAY COMPANY, a Delaware
corporation

Defendant.

NO. C06-5349 JKA

FINAL PRETRIAL ORDER

JURISDICTION

This Court has jurisdiction over Plaintiff's claims against Defendant as provided by the Federal Employers' Liability Act (FELA) 45 U.S.C. § 51 *et. seq.*

CLAIMS AND DEFENSES

Plaintiff will pursue at trial the following claims:

That on February 13, 2005, plaintiff claims to have suffered an injury while in the course of his employment with BNSF. Plaintiff claims that the injuries were caused by defendant's negligence and defective equipment provided by defendant, in violation of the Federal Employers Liability Act. As a direct result of defendant's negligence and violations of the Federal Employers Liability Act, plaintiff claims to have suffered back and related hip injuries, pain, suffering, disability and past and future economic losses.

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1 *Defendant BNSF will assert as follows:*

3 Defendant has admitted that plaintiff reported an injury on February 13, 2005, however
4 BNSF has denied the nature of the allegations of liability against it, and has also denied the
5 allegations regarding the cause of the injury to plaintiff's hips and the extent of the damages
6 claimed by plaintiff.

7 ADMITTED FACTS

8 *The following facts are admitted by the parties:*

9 1. Plaintiff has worked for defendant BNSF since 1992, and has held the job of
10 locomotive conductor since 1994. From 1994 to the present, plaintiff worked in the Seattle
11 and Tacoma area, and his duties as a conductor included coupling, uncoupling and switching
12 rail cars at sidings, junctions, rail yards and other places.

13 2. On February 13, 2005, while in the normal course of his employment, plaintiff was
14 instructed to remove a freight car from a train, and move the freight car to a siding track. In
15 order to do so, plaintiff was required to operate a track appliance or device known as a
16 "derail." When activated, this derail device is designed to derail a freight car to prevent
17 unauthorized travel. Plaintiff disengaged or opened the derail device. In the course of doing
18 so, plaintiff claims that he suffered back injuries.

19 3. Plaintiff underwent medical treatment as a result of these injuries, including lumbar
20 epidural steroid injections, low back surgery, extensive physical therapy and rehabilitation.
21 Plaintiff developed a condition of the hips known as avascular necrosis, which necessitated
22 bilateral hip replacement. Since 2005, plaintiff has worked sporadically due to limitations
23 imposed by his medical providers and is now unable to return to his job as a conductor.

24 *The plaintiff contends as follows:*

25 1. Defendant was negligent and in violation of the Federal Employers Liability Act and
26 said negligence was a direct cause of plaintiff's injuries and complications.

2. Specifically, defendant was negligent in the provision, maintenance, instructions and work methods pertaining to the operation of the flip-flop derail device which caused plaintiff's injuries.

3. Plaintiff sustained back injuries which required treatment with steroids and surgery.

4. As a direct result of the steroid treatment, plaintiff developed avascular necrosis of both hips, requiring total hip replacement.

5. Plaintiff suffered damages as a direct result of defendant's negligence.

The defendant contends as follows:

1. Defendant BNSF provided Plaintiff with a reasonably safe place to work.

2. Plaintiff's injuries were not caused by Defendant's actions, but by preexisting physical and medical conditions not within defendant's control.

3. Plaintiff's comparative fault caused or contributed to plaintiff's injuries and serves to preclude or reduce plaintiff's claim for damages accordingly.

4. Plaintiff's contention that the twinge he felt in his back caused the avascular necrosis that later developed in his hips, or that his hip condition was caused by steroid injections given to him to treat his back injury lacks medical support.

5. Plaintiff has failed to properly mitigate his damages in this case.

6. Defendants are not liable for plaintiff's claimed damages, .

ISSUES OF LAW

Plaintiff contends, and defendant agrees, that this is a case involving a claim of negligence. As such, the issues are as follows:

- (a) Was defendant negligent?
- (b) If defendant was negligent, did such negligence violate the FELA?
- (c) Did defendant's negligence, if any, cause plaintiff's back and/or hip injuries?
- (d) Are plaintiff's damages, if any, precluded, reduced, or offset by any of the affirmative defenses asserted by defendant, and if so, to what extent?

EXPERT WITNESSES

(a) The parties are limited to the number
 (b) The names and addresses of the expert witnesses to be used by each party at trial
 and the issue upon which each will testify are:

(1) On behalf of plaintiff;

Name	Will Testify or Possible Witness Only
Wilson C. Hayes, Ph.D. Hayes + Associates 301 SW 4th Street, Suite 160 Corvallis, OR 97333 Will testify re negligence and causation	Will Testify
Merrill Cohen Strategic Consulting Services 401 Olympia Ave. NE Suite # 301 Renton, Washington Will testify re vocational rehabilitation	Will Testify
Jeffrey Opp Carlson, Opp & Associates 7600 E. Arapahoe Road Suite 100 Englewood, Colorado 80112 Will testify re economic losses	Will testify
Virgil Becker, M.D. Cascade Orthopedics 122 3rd NE, #401 Auburn, WA 98002 Treating physician: will testify re medical issues	Will Testify by deposition
James Parker, M.D. 305 N. River Avenue Buckley, WA 9832 Treating physician: will testify re medical issues	Will Testify by deposition
Terri Archer, LOTA/L Performance Work Rehab 1830 112th St E Tacoma, Washington 98445 Treating physical therapist: will testify re physical rehabilitation issues, effect of injuries, return to work	May Testify

(2) On behalf of defendant;

Name	Will Testify or Possible Witness Only
Dr. Michael Battaglia 3 Church Circle, Suite 210 Annapolis, MD 21201 Dr. Battaglia will testify to plaintiff's orthopedic issues	Will Testify
Stan Owings Owings and Associates, Inc. 11422 Des Moines Memorial Drive, Seattle, WA 98168 Mr. Owings will testify to plaintiff's vocational rehabilitation	Will Testify
Dr. David Knowles 3302 Fuhrman Ave E., Suite 111 Seattle, WA 98102 Dr. Knowles will testify to plaintiff's economic loss claim	Will Testify

LAY WITNESSES

(a) The names and addresses of each witness to be called by each party at trial and the subject matter upon which each witness will testify are:

(1) On behalf of plaintiff;

Name	Will Testify or Possible Witness Only
Robert Ainsworth 22313 112th Street Court East Buckley, Washington 98321 Plaintiff	Will Testify
Michael D. Hamilton BNSF Engineer	May Testify

Andrew Vulgas

May Testify

BNSF Roadmaster

May testify re condition of derail on inspection.

(2) On behalf of defendant;

Danny Thomassen
Claims Manager / BNSF
c/o Montgomery Scarp MacDougall
1218 Third Avenue, Suite 2700
Seattle, WA 98101

Possible Witness Only

Mr. Thomassen may testify for the limited purpose of the recorded statement of plaintiff, the facts and circumstances surrounding plaintiff's previous back injury and release for the same, and any employment offers conveyed to plaintiff.

EXHIBITS

(a) Admissibility stipulated:

Plaintiff's Exhibits

- 33. 2 photographs of derail device (Exh. 3, Ainsworth Dep.); 2 photographs of location of accident (Ex. 4, Ainsworth Dep.)
- 43. Spine and hip models (for illustrative purposes only)
- 50. 02/14/2005 BNSF Employee Personal Injury Report, with statements of plaintiff and engineer Michael D. Hamilton attached, and BNSF "Non-Reportable Injury Follow-up Instructions."

Defendant's Exhibits

- A-1 Employee Injury/Occupational Illness Report
- A-2 2/14/05 Statement of Robert Ainsworth
- A-3 2/14/05 Statement of Michael Hamilton
- A-4 Photos of the Derail

(b) Authenticity stipulated, admissibility disputed:

Plaintiff's Exhibits

1. 03/7/2005 lumbar spine x-ray, Dr. David Rice.
2. 03/29/2005 Nydic lumbar spine MRI.
3. 04/4/2005 lumbar ESI injection report, Dr. David Rice.
4. 04/19/2005 lumbar ESI injection report, Dr. David Rice.
5. 05/3/2005 lumbar ESI injection report, Dr. David Rice.
6. 06/24/2005 initial patient intake form, Dr. Virgil Becker.
7. 07/13/2005 diskography report, Elliott Sacks, M.D.
8. 06/24/2005-11/25/2005 records and reports of Dr. Virgil Becker
9. 12/1/2005 lumbar ESI injection report, Dr. David Rice.
10. 12/1/2005 letter from Dr. Daniel Anderson to Dr. Virgil Becker.
11. 12/7/2005 chiropractor report, Daniel Anderson, D.C.
12. 12/8/2005 Lumbar spine x-ray, David Rice, M.D.
13. 12/21/2005 letter regarding job descriptions, Dr. Daniel Anderson.
14. 01/30/2006 discharge summary, Dr. Virgil Becker, Auburn Reg. Med. Ctr.
15. 02/16 – 04/5/2006 MVP Physical Therapy chart notes.
16. 04/10/2006 Work Hardening Update rpts., Olympic Sports & Spine.
17. 04/10/2006 Intake checklist and form and patient questionnaire.
18. 04/11/2006 Olympic Sports & Spine Rehab report titled "Personal Profile."
19. 04/13/2006 MCMC records; Ashley Stevens, RN.
20. 04/10 – 05/1/2006 chart notes, Olympic Sports & Spine.
21. 05/4/2006 MRI of hips, Jeffrey Morrison, M.D.
22. 05/4/2006 hip MRI, Valley Diagnostic Imaging.
23. 05/10/2006 billing summary, Olympic Sports & Spine.
24. 05/18/2006 Patient statement inquiry.
25. 06/7/2006 Patient Medical History Form, David H. Bishop, M.D.

26. 06/7/2006 report of Dr. David Bishop.
27. 06/16/2006 operative report, Virgil Becker, M.D.
28. 02/23/2005-06/19/2006 Records of James L. Parker, M.D.
29. 07/11/2006 report of Gary P. Hunter, D.O.
30. 07/14/2006 operative report, Dr. Gary Hunter.
31. 07/17/2006 Attending Physician Suppl. Statement, Dr. Gary Hunter.
32. 08/23/2006 operative report, Dr. Gary Hunter.
37. Supervisor's Report and report of inspection of derail device.
44. Ainsworth tax returns.
51. 08/27/2007 DVD with photographs and video from inspection of accident site by Wilson C. Hayes, Ph.D.
53. 10/19/2007-2008 chart notes, Performance Work Rehabilitation, Terri Archer.
54. 11/15/2007 report of Wilson C. Hayes, Ph.D.
55. 12/21/2007 report, Merrill Cohen.
56. 12/21/2007 report; 12/26/2007 supplemental report, Jeffrey B. Opp.
57. Photographs of derail taken by defendant shortly after accident.
59. 12/17/2007 report of Dr. Becker.

Defendant's Exhibits

- A-5 11/6/2007 report, Stan Owings.
- A-6 CV, Stan Owings.
- A-7 8/21/07 report, Dr. Michael Battaglia
- A-8 8/26/07 report addendum, Dr. Michael Battaglia.
- A-9 1/8/08 report addendum, Dr. Michael Battaglia.
- A-10 CV, Dr. Michael Battaglia.
- A-11 12/28//07 report, Dr. David Knowles.
- A-12 CV, Dr. David Knowles.
- A-13 Recorded Statement of Robert Ainsworth.

A-14 Employee Injury/Occupational Illness Report.
A-15 BNSF Employee Transcript.
A-16 Medical Records – Injury of 2/13/05.
A-17 Medical Records - Back Injury of 09/12/00.
A-18 3/14/05 Voluntary Advancement Program, signed by Robert Ainsworth
A-19 Letter to Mr. Ainsworth from Joan Costa dated January 29, 2008
A-20 5/19/2006 report of Dr. Becker
A-21 9/15/2003 report of Dr. Michael A Welsh

(c) Authenticity and admissibility disputed:

Plaintiff's Exhibits

34. Learned treatise materials on steroids and avascular necrosis relied upon by plaintiff's experts.
35. FDA publications on Kenalog.
36. Medical and scientific journal articles regarding steroids and avascular necrosis.
38. Defendant's Claims file.
39. Prescribing information for Kenalog, Physicians Desk Reference.
40. Manufacturer's product insert for Kenalog.
41. Prescribing information for Medrol, Physicians Desk Reference.
42. Manufacturer's product insert for Medrol.
45. Defendant's Seniority roster.
46. Personnel file.
47. High school transcript.
48. April 1990 AAR report "An Ergonomic Investigation of Hand Switch Operation."
49. October 1993 AAR report "Manual of Hand Switch Operation."
52. NIOSH report referenced in report of Dr. Hayes.
58. Report of inspection of derail by Andrew Vulgas, roadmaster.

1 *Defendant's Exhibits*

3 //

4 **ORDERS IN LIMINE**

5 **(a) Pursuant to the agreement of the parties, the court orders as follows:**

6 *Plaintiff's Motions In Limine:*

- 7 (1) Railroad Retirement Eligibility: Defendant is precluded from introducing
evidence regarding railroad retirement eligibility.
8 **(Stricken without prejudice at pretrial conference.)**
- 9 (2) Collateral Source Benefits: Defendant is precluded from introducing evidence
of benefits or payments that plaintiff may receive from an independent source.
10 This does not include payments from BNSF or earnings from other employment
that would be relevant to the issue of mitigation of damages.
- 11 (3) Assumption of Risk: Defendant is precluded from arguing that plaintiff assumed
12 the risk of injury as part of the nature of his employment.

13 *Defendant's Motions In Limine:*

- 14 (4) Federal Safety Appliance Act / Locomotive Inspection Act: Plaintiff is
precluded from arguing or introducing evidence relating to the Federal Safety
15 Appliance Act or the Locomotive Inspection Act as no claims are being pursued
thereunder.
- 16 (5) Loss of Consortium: Plaintiff is precluded from offering any evidence or
17 testifying regarding loss of consortium.
- 18 (6) Relative Financial Conditions: Neither party shall mention plaintiff's or
19 defendant's relative financial positions.
- 20 (7) Railroad's General Safety or Lack of Safety: Plaintiff is precluded from offering
any evidence, arguing or referring to the railroad as a generally unsafe or
21 dangerous place to work.
- 22 (8) Punitive Arguments: Plaintiff is precluded from arguing or suggesting any type
of punitive award, or that a large award will "send a message" to the railroad.
Such punitive damages are not recoverable under the FELA. Arguments
23 designed to inflame the jury to "punish" a defendant in an FELA case are
inadmissible and constitute reversible error.
- 24 (9) Plaintiff's Financial Condition / Expenditures / Financial Needs: Plaintiff is
precluded from offering any evidence, testifying, arguing or referring to his
25 financial condition, expenditures or requirements for expenditures other than
those directly related to his injury. Plaintiff shall not introduce testimony to
26 imply poverty or neediness or inability to maintain his standard of living.
- 27 (10) Non-Party Witnesses Excluded: Witnesses who may be called by either party
shall be excluded from the courtroom prior to giving their testimony. ER 615.

- (11) Mediation / Settlement Negotiations: Neither party shall make reference to settlement negotiations or mediation. Offers to compromise are inadmissible at time of trial. ER 408.
- (12) Physical Demonstration of Injury: Plaintiff is precluded from offering any evidence or physical demonstration of his injury.
- (13) Liability or Indemnity Insurance: Plaintiff is precluded from making any reference whatsoever that defendant has any type of insurance coverage. The fact that a defendant may or may not be insured is entirely immaterial to the issues in the case.
- (14) Characterization of Attorneys: The parties are precluded from referring to themselves or the other lawyers in the case except by name or as representing their respective party. The attorneys shall not be referred to as "corporate counsel, out-of-state counsel, Seattle attorneys, railroad lawyers," or other similar characterizations.
- (15) Golden Rule Arguments: Plaintiff is precluded from making any "golden rule" argument or appealing to jurors to put themselves in the plaintiff's position and to decide on what they would want under similar circumstances. Such arguments are improper and misleading.
- (16) Motions In Limine: The parties are precluded from referring to the motions *in limine*.
- (17) Unrelated Railroad Accidents or Lawsuits: Plaintiff is precluded from making any reference to other lawsuits, claims of injuries, and/or accidents involving the railroad. Evidence of other lawsuits or accidents involving defendant is not admissible to establish negligence in this case. ER 404(b).

(b) The following motions *in limine* are in dispute, and require rulings by the court:¹

(The Court ruled at pretrial conference on 3/12/2008.)

- (18) The Alleged "Congressional Intent" Of The Federal Employers' Liability Act Should Be Excluded. The parties are precluded from offering any testimony or making any reference to the "congressional intent" of the enactment of the FELA. It is improper to refer to any purported "congressional intent" of the FELA.
- (19) BNSF's Supervisor Report Is Not Admissible. Plaintiff is precluded from offering any testimony or evidence related to the BNSF Supervisor's Report. Under federal law, BNSF is required to submit monthly reports of employee accidents to the Federal Railroad Administration. 49 USC § 20901; 49 CFR §§ 225.11; 225.19. However, no part of the accident reports can be admitted or used for any purpose in any action "for damages resulting from a matter mentioned in the report." 49 USC § 20903 and 49 CFR §225.7. Moreover, plaintiff did not disclose the report under CR 26, did not request it through

¹ (See Defendant BNSF's Motions In Limine).

discovery, and plaintiff's expert did not rely on the report in formulating his opinions.

- (20) Railroad Discipline or Disciplinary Measures: Plaintiff is precluded from offering any evidence that BNSF did or did not discipline him for this incident.
- (21) Family Status: Plaintiff is precluded from offering any evidence or testifying regarding his family or family status in any way.
- (22) Workers' Compensation Case / Law: Plaintiff is precluded from offering any evidence or reference to this action as a workers' compensation case. Defendant is not covered by state workers' compensation laws. Evidence that defendant is not covered by the state workers' compensation scheme shall also be excluded.
- (23) Occurrence Or Quality Of Defendant Railroad's Post Accident Investigation. Plaintiff is precluded from introducing evidence or making reference to any post accident investigation by defendant railroad. Evidence relating to this issue is federally preempted. The preemptive effect of regulations adopted pursuant to the Federal Rail Safety Act, 49 U.S.C. § 20101, *et. seq.*, is set forth in 49 U.S.C. § 20106; *See also Norfolk Southern Ry. Co. v. Shanklin*, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000).
- (24) Evidence Regarding Safer Procedures Or Methods of Work. Plaintiff is precluded from arguing or offering evidence or arguing that the railroad could have provided safer procedures or methods of work, because such evidence misstates defendant's duty. In establishing the railroad's duty in FELA cases, the courts have consistently held that the duty is simply to provide reasonably safe equipment. The railroad is not required to furnish an absolutely safe workplace. Rather, the railroad's duty is to exercise reasonable and ordinary care to provide a reasonably safe place for the work to be performed. *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943).
- (25) Evidence Of Plaintiff's Gross Wage Loss. Plaintiff is precluded from offering evidence of gross wages or economic loss based on gross earnings. Because damages are limited to the proven pecuniary loss sustained by plaintiff, merely calculating the gross income which the plaintiff would have earned in the future is an improper measure of damages in a FELA case. Only after-tax earnings, or net loss earnings, can be used. *Norfolk & Western Railway v. Leipelt*, 444 U.S. 490 (1980).
- (26) FELA As The Sole Remedy Available To The Plaintiff. Plaintiff is precluded from arguing, making reference to, or implying that the FELA is plaintiff's sole remedy. The existence or non-existence of the FELA as the sole remedy has no relevance in this trial. Comments by plaintiff's counsel to the effect that the plaintiff has no compensation rights other than through prosecution of this FELA case are, under the greater weight of authority, irrelevant, improper, and would constitute prejudicial error. *Van Slyke v. New York Central*, 21 A.D. 2d 147, 249 NYS 2d 462, 466 (1964); *see also Kocack, supra* at 247; *Lanni v. Wyer*, 219 F.2d 701, 703 (2d Cir. 1955).

- 1 (27) Reference To Plaintiff As A Good Or Safe Employee.
 2 Plaintiff is precluded from arguing, testifying or implying that plaintiff is a good or
 3 a safe employee. Whether plaintiff was on other occasions a good or safe worker
 4 is not an issue in this case and would seem to bear only on the images of the
 5 parties as being "good" or "bad". As such, evidence that on other occasions
 6 plaintiff was a good or safe worker would be prejudicial if admitted, and should
 7 be excluded. ER 402, 403. Evidence of a person's character as a good or safe
 8 worker (or otherwise) used to prove the quality and nature of his conduct at the
 9 time of the accident is also inadmissible. ER 404.
- 10 (28) Evidence of Related Medical Conditions or Accidents Is Admissible. It is
 11 anticipated that the plaintiff will argue that under *Norfolk & Western Ry. v. Ayers*,
 12 538 U.S. 135, 123 S. Ct. 1210, 155 L.Ed. 2d 261 (2003), this court should
 13 preclude any evidence that his injuries were caused by a pre-existing condition.
 14 Such evidence is admissible here. In *Rust v. BNSF*, 2003 U.S. Dist. LEXIS
 15 24476 (D.C. Co. 2003), the court disagreed, finding that *Ayers* did not ever
 16 address whether a railroad could introduce evidence of an employee's preexisting
 17 medical condition in determining the extent of the employee's fault. The *Rust*
 18 court decided that post-*Ayers*, the prevailing law on this issue is still *Sauer v.*
 19 *Burlington N. R.R. Co.*, 106 F.3d 1490, 1494 (10th Cir. 1997), where evidence of
 20 an employee's preexisting medical condition was proper so that the jury could
 21 determine to what extent, if any, the preexisting condition should affect a finding
 22 of liability or computation of damages.
- 23 (29) Experts / Lay Witnesses Not Previously Or Properly Disclosed.
 24 Plaintiff is precluded from offering any expert witnesses not timely identified and
 25 whose opinions and all relevant facts in support thereof have not been properly
 26 disclosed. Fed.R.Civ.P. 26(a). Plaintiff is further precluded from calling any lay
 27 witnesses not timely disclosed. *Id.*
- 28 (30) Plaintiff's Expert Wilson C. Hayes' Medical Causation Opinions.
 29 Plaintiff is precluded from offering medical testimony by biomechanical
 30 engineering expert Wilson C. "Toby" Hayes. Mr. Hayes is precluded from
 31 testifying at trial that plaintiff's back injury was caused by operating BNSF's
 32 derail switch. Mr. Hayes, is an engineer, and is not competent to testify as to
 33 medical causation of injury under FRE 702.
- 34 (31) Plaintiff's Expert David Schenkar's Medical Causation Opinions.
 35 Plaintiff is precluded from offering testimony regarding medical causation testimony
 36 by expert witness Dr. David Louis Schenkar. Dr. Schenkar is precluded from
 37 testifying at trial that plaintiff's avascular necrosis was caused injections of epidural
 38 steroids.
- 39 (32) Railroad Retirement Benefits / Monetary Advancement / Pension Contribution
 40 (a) BNSF may introduce evidence of Railroad Retirement benefits. Evidence of
 41 benefits paid under the Railroad Retirement System shall be permitted on the issue
 42 of plaintiff's failure to mitigate his damages.
 43 (b) For monetary advancements to plaintiff under BNSF's Voluntary Income
 44 Program, BNSF is entitled to a set-off as to any monies plaintiff received under that
 45 program.
 46 (c) The cost of BNSF's contribution to a pension system are paid as taxes to the
 47 Railroad Retirement system, similar to Social Security. If plaintiff is eligible to

receive, or did receive any benefits under this system, BNSF's contribution is not a fringe benefit and shall be excluded from plaintiff's economists calculations.

As provided for in the Court's December 11, 2006 Scheduling Order, defendant has submitted, along with this proposed pretrial order, a memorandum addressing the merits of the disputed orders *in limine*.

ACTION BY THE COURT

- (a) This case is scheduled for a jury trial beginning on March 17, 2008.
- (b) Trial briefs should be submitted to the court on or before - **filed 3/3/2008**.
- (c) **Amended jury instructions are to be submitted forthwith.**
- (d) Other court rulings.

This order has been approved by the parties as evidenced by the signatures of their counsel. This order shall control the subsequent course of the action unless modified by a subsequent order. This order shall not be amended except by of order of the court pursuant to agreement fo the parties or to prevent manifest injustice.

DATED this 13th day of March, 2008.

BY THE COURT:

/s/ J. Kelley Arnold
Honorable J. Kelley Arnold
United States Magistrate Judge

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